IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 8TH FEBRUARY 2007 / 19TH MAGHA 1928

CRL.A.No. 2300 of 2006(B)

SC.1075/2005 of ASSISTANT SESSIONS COURT, OTTAPPALAM
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APPELLANT:

NANJAN @ NOORU,S/O.RANGAN,
C.NO.3954, CENTRAL PRISON,
KANNUR.

BY ADV. ADV.P.V.VIJAYA KUMAR(STATE BRIEF)

RESPONDENT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SHRI K.S.SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 2300 OF 2006

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DATED THIS THE 8TH DAY OF FEBRUARY, 2007

J U D G E M E N T

In this appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in S.C.No.1075/05 on the file of the Assistant Sessions Court, Ottappalam for an offence punishable under section 55(a) of the Abkari Act, challenges the conviction entered and the sentence passed against him by the said Court.

2. The case of the prosecution is that on 29.4.2003 at about 6.30 PM, the accused was found carrying a jerry can containing 5 litres of illicit arrack near the Siruvani Bridge at Sambarkode within the limits of Sholayar Police Station and that the accused thereby committed an offence punishable under section 55(a) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined six witnesses as Pws 1 to 6 and got marked four documents as

Exhibits P1 to P4 and one material object as MO1. After the close of the prosecution evidence, the accused was questioned under section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

4. Since the court below did not consider this a fit case for recording an order of acquittal under section 232 Cr.P.C., the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He did not adduce any defence evidence.

5. The learned Assistant Sessions Judge after trial, as per order dated 29.9.2006 found the appellant guilty of the offence and sentenced him to undergo simple imprisonment for 7 years and also to pay a fine of Rs.1 lakh and on default to the pay the fine, to suffer simple imprisonment for one year. It is the said judgment which is assailed in this appeal.

6. I heard Advocate Shri P.V.Vijaya Kumar the learned counsel who defended the case on State Brief and Advocate Shri K.S.Sivakumar the learned Public Prosecutor who defended the

State. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not.

The point:

7. PW1 was the Circle Inspector of Police, Agaly who detected the offence. PW2 was the Police Constable who accompanied PW1 while the latter was proceeding on patrol duty. PW3 is an attestor to Exhibit P1 seizure mahazar prepared by PW1. PW4 is an attestor to Exhibit P2 scene mahazar prepared by PW5. PW5 is the ASI who registered Exhibit P3 FIR. PW6 is the Sub Inspector of Police, Sholayar Police Station who after completion of investigation laid the charge.

8. After an anxious reappraisal of the oral and documentary evidence of the accused and after hearing both sides, I am not convinced that the prosecution has brought home the guilt of the appellant beyond reasonable doubt. Going by the testimony of PWs 1 and 2, the accused was found carrying a jerry can containing some liquid suspected to be illicit arrack at about 6.30 PM on 29.4.2003 near the Siruvani Bridge at Sambarkode. PW1 claims to have arrested the accused and

seized the jerry can together with the alleged contraband liquor after drawing two samples each of 180ml therefrom. Going by Exhibit P1 contemporaneous mahazar prepared by PW1 from the spot itself, he seized the jerry can and drew two samples under Exhibit P1 mahazar. After the search and seizure, PW1 claims to have entrusted the properties with PW5 the ASI who registered Exhibit P3 FIR. Except stating that he had forwarded the properties to the court, no attempt was made to mention the date on which the properties were forwarded to the court. Similarly, the property list in 151 A form also was not produced in the case. Therefore, the court is in the dark regarding the date on which the properties were produced before court. Exhibit P4 certificate of chemical analysis dated 18.12.2004 mentions about a letter dated 30.12.2003 of J.F.C.M., Mannarkkad as per which two samples each of 180 ml were received for chemical analysis. It is not known as to why the samples were forwarded from the committal court to the Chemical Examiner even without any requisition or forwarding note by the Investigating Officer. The prosecution has not explained the reason as to why two samples were sent by the Magistrate to the Chemical Examiner even

without any request by the Investigating Officer. The court is also in the dark as to the identity of the samples. There is nothing to indicate that the samples which were analysed by the Chemical Examiner wee the very same samples drawn by PW1 from the jerry can allegedly possessed by the accused. Similarly, there is no evidence adduced to show that the two samples which were allegedly drawn by PW1 from the bulk quantity and which were allegedly sealed by PW1 from the spot itself were produced in the same condition before court and it was those samples which ultimately found their way into the hands of the Chemical Examiner. Prosecution can succeed in securing a conviction against the accused only if it is proved that the liquid which was in the jerry can carried by the accused was illicit arrack as disclosed by the result of the sample taken from such liquid and despatched to the Chemical Examiner in a tamper-proof condition. This was more so when the samples would have changed several hands before they reached the hands of the Chemical Examiner. Unless it is shown that the samples which were analysed by the Chemical Examiner were the very same samples which were drawn by the Detecting Officer from the bulk

quantity allegedly possessed by the accused no conviction can safely be recorded against the accused. **(Vide State of Rajasthan v. Doulat Ram AIR 1980 SC 1314 and Valsala v. State of Kerala 1993 (2) KLT 540).**

9. There is thus no link evidence in this case to connect the accused with the samples eventually analysed by the Chemical Examiner under Exhibit P4 certificate of analysis. The conviction entered and the sentence passed against the appellant overlooking the above vital aspects cannot therefore be sustained and are accordingly dislodged.

10. The appellant is found not guilty of the offence punishable under section 55(a) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed in connection with any other case.

In the result, this Criminal Appeal is allowed as above.

V.RAMKUMAR, JUDGE

dsn

Crl. A.No. 2300/06

V. RAMKUMAR, J.

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Crl. Appeal No. 2300 OF 2006

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DATED THIS THE 8TH DAY OF FEBRUARY, 2007

G I S T O F T H E J U D G E M E N T

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V.RAMKUMAR, JUDGE

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